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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 UNITED STATES OF AMERICA,) 2:05-cr-240-GEB
12 Plaintiff,)
13 v.) ORDER
14 HAMID HAYAT,)
15 Defendant.)
16 _____)

17 Defendant Hamid Hayat filed a motion for a new trial under
18 Federal Rule of Criminal Procedure 33 on October 27, 2006. The
19 government filed an opposition on February 3, 2007, and Hayat filed
20 a reply on March 20, 2007. Hearings were held on April 6 and April
21 13, 2007. For the following reasons, Hayat's motion is denied.

22 **I. Background**

23 On April 25, 2006, a jury returned guilty verdicts on all
24 four counts charged in the second superceding indictment: three
25 counts of violating 18 U.S.C. § 1001 (making false statements to FBI
26 officials), and one count of violating 18 U.S.C. § 2339A (providing
27 material support to terrorists). Hayat's trial commenced on
28 February 14, 2006. The jury began deliberations on April 12, 2006.

II. Standard of Review

Federal Rule of Criminal Procedure 33 provides that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). A Rule 33 motion for a new trial can be granted "[i]f the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred." U.S. v. Alston, 974 F.2d 1206, 1211-12 (9th Cir. 1992) (quoting U.S. v. Lincoln, 630 F.2d 1313, 1319 (8th Cir. 1980)). In evaluating whether a Rule 33 motion should be granted, "[t]he district court . . . may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses." Alston, 974 F.2d at 1211 (quoting Lincoln, 630 F.2d at 1319).

A new trial "should be granted 'only in exceptional cases in which the evidence preponderates heavily against the verdict.'" U.S. v. Pimentel, 654 F.2d 538, 545 (9th Cir. 1981) (quoting 2 Wright, Federal Practice and Procedure, Criminal § 553 at 487 (1969)). "The court may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable. The evidence must preponderate heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." U.S. v. Martinez, 763 F.2d 1297, 1312-13 (11th Cir. 1985) (internal citations omitted).

III. Analysis

A. Juror Bias/ Misconduct

Hayat argues that he is entitled to a new trial because the foreman of the jury, Joseph Cote, harbored a bias against him

1 and because Cote and another juror, Deborah Horn, engaged in
2 prejudicial misconduct. (Mot. at 69, 95.)

3 "The Sixth Amendment guarantees criminal defendants a
4 verdict by impartial, indifferent jurors. The bias or prejudice of
5 even a single juror would violate [a defendant's] right to a fair
6 trial." Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir. 1998);
7 Tinsley v. Borg, 895 F.2d 520, 523-24 (9th Cir. 1990). "[T]o obtain
8 a new trial [based on a claim that a juror was dishonest during voir
9 dire], a party must first demonstrate that a juror failed to answer
10 honestly a material question on voir dire, and then further show
11 that a correct response would have provided a valid basis for a
12 challenge for cause." McDonough Power Equip., Inc. v. Greenwood,
13 464 U.S. 548, 556 (1984).

14 When considering a claim that juror misconduct justifies
15 granting a new trial motion, "[t]he test is whether or not the
16 misconduct . . . prejudiced the defendant to the extent that he
17 [did] not receive[] a fair trial." U.S. v. Klee, 494 F.2d 394, 396
18 (9th Cir. 1974). "In conducting their deliberations, jurors have a
19 duty to consider only the evidence which is presented to them in
20 open court. Evidence not presented at trial . . . is deemed
21 extrinsic." U.S. v. Navarro-Garcia, 926 F.2d 818, 820 (9th Cir.
22 1991) (internal citations, quotation marks, and brackets omitted);
23 see also Thompson v. Borg, 74 F.3d 1571, 1574 (9th Cir. 1996)
24 ("Juror misconduct typically occurs when a member of the jury has
25 introduced into its deliberations matter which was not in evidence
26 or in the instructions."). "When information not placed in evidence
27 reaches the jury during its deliberations, the defendant is entitled
28 to a new trial if 'there existed a reasonable possibility that the

1 extrinsic material could have affected the verdict.'" U.S. v.
2 Bagley, 641 F.2d 1235, 1240-41 (9th Cir. 1981) (quoting U.S. v.
3 Vasquez, 597 F.2d 192, 193 (9th Cir. 1979)).

4 "In evaluating a claim of juror misconduct [or bias], we
5 begin with the presumption that the juror is impartial, [faithfully
6 performed official duties, and followed the instructions given by
7 the court]." U.S. v. Collins, 972 F.2d 1385, 1403 (5th Cir. 1992);
8 U.S. v. Eldred, 588 F.2d 746, 752 (9th Cir. 1978); see also Alston,
9 974 F.2d at 1210. "[I]t is incumbent upon the defendant to prove
10 otherwise.'" Collins, 972 F.2d at 1403 (quoting U.S. v. Wayman, 510
11 F.2d 1020, 1024 (5th Cir. 1975)); U.S. v. Elias, 269 F.3d 1003, 1021
12 (9th Cir. 2001).

13 A defendant making a claim of juror bias or misconduct
14 will not be allowed "to evade the prohibition of [Federal Rule of
15 Evidence] 606(b) under the guise of a Rule 33 motion." Ortega v.
16 U.S., 270 F.3d 540, 547 (8th Cir. 2001). Rule 606(b) prescribes: "a
17 juror may not testify as to any matter or statement occurring during
18 the course of the jury's deliberations or to the effect of anything
19 upon that or any other juror's mind or emotions as influencing the
20 juror to assent to or dissent from the verdict or indictment or
21 concerning the juror's mental processes in connection therewith."
22 Fed. R. Evid. 606(b). However, "a juror may testify about (1)
23 whether extraneous prejudicial information was improperly brought to
24 the jury's attention, (2) whether any outside influence was
25 improperly brought to bear upon any juror, or (3) whether there was
26 a mistake in entering the verdict onto the verdict form." Id.
27 Additionally, "[s]tatements which tend to show deceit during voir
28 dire are not barred by [Rule 606(b)]." U.S. v. Henley, 238 F.3d

1 1111, 1121 (9th Cir. 2001) (quoting Hard v. Burlington N. R.R., 812
2 F.2d 482, 485 (9th Cir. 1987)).

3 [T]he . . . purpose behind Rule 606(b) is to
4 preserve one of the most basic and critical
5 precepts of the American justice system: the
6 integrity of the jury. Rule 606(b) allows for a
7 system in which jurors may engage in
8 deliberations with the utmost candor, performing
9 in an uninhibited way the fact-finding duties
10 with which they are charged. In this manner, the
11 Rule provides jurors with an inherent right to
12 be free from interrogation concerning internal
13 influences on the decision-making process. Such
14 internal influences have been held to include
15 pressure of one juror on another; juror
16 misunderstanding of court instructions; a
17 verdict achieved through compromise; juror
18 misgivings about the verdict; and juror
19 agreement on a time limit for a decision.
20 Accordingly, Rule 606(b) prevents the
21 unwarranted badgering of jurors that would
22 invariably arise in its absence in an alleged
23 attempt to search for the "truth" as to the
24 manner in which each and every jury reaches a
25 verdict.

26 Moreover, Rule 606(b) does not exist in a
27 vacuum. To the contrary, the Rule exists as just
28 one portion of the overall justice system, which
is likewise designed to protect the
constitutional rights of the defendant,
including the defendant's Sixth and Fifth
Amendment rights to a fair trial and an
impartial jury under the Constitution.

Against this backdrop, a court facing
post-verdict allegations of jury misconduct
shall rely on the essence of Rule 606(b), which
provides that if the case involves an extraneous
or external influence on the jury, then a
post-verdict interrogation of jurors is
permitted in order to adequately protect the
defendant's constitutional rights. Conversely,
if the case involves an internal influence, the
Rule does not permit the post-verdict
interrogation of jurors. In the latter instance,
the preservation of the integrity of the jury
system outweighs any potential violation of the
defendant's constitutional rights. In this way,
the internal influence versus external influence
distinction in the Rule is designed to balance

1 the preservation of the integrity of the jury
2 system and the rights of the defendant.

3 U.S. v. Logan, 250 F.3d 350, 379-80 (6th Cir. 2001) (internal
4 citations omitted).

5 **1. Jury Foreman Cote**

6 Hayat seeks a new trial, arguing that the jury foreman,
7 Joseph Cote, harbored a disqualifying racial and religious bias
8 which he failed to disclose during voir dire, and that he committed
9 prejudicial misconduct. (Mot. at 69, 95.) Specifically, Hayat
10 argues that Cote made hangman gestures before deliberations, made
11 racist remarks during deliberations, made an improper telephone call
12 to alternate juror Watanabe during deliberations, brought extraneous
13 information into the jury room during deliberations, and made
14 inappropriate remarks to a reporter from the Atlantic Monthly after
15 the trial concluded. (Id. at 80-85.) Hayat contends that Cote's
16 conduct and statements as a whole reveal his presence on the jury
17 denied Hayat his constitutional right to a fair and impartial jury.
18 (Reply at 3-4.)

19 The government counters that "contrary to [Hayat]'s
20 claim[s], there is no substantial and admissible evidence to suggest
21 that [Cote] harbored a disqualifying racial or religious bias or
22 that [he] engaged in any form of cognizable and prejudicial
23 misconduct." (Opp'n at 4.)

24 The hangman gesture allegations are based on fellow juror
25 Arcelia Lopez's averments that, during trial, Cote "gestured as if
26 he was tying a rope around his neck and then pulling the rope in an
27 upward motion[, and] then said 'Hang Him.'" (Mot. at 80; Lopez Aff.
28 ¶ 3.) These allegations combined with statements Cote allegedly

1 made to the Atlantic Monthly during a post-trial interview prompted
2 the trial judge to hold an evidentiary hearing on April 6, 2007,
3 during which Cote was asked questions concerning those allegations
4 and statements. The salient magazine statements attributed to Cote
5 follow: there are "so-called new rules of engagement, and I don't
6 want to see the government lose its case"; it is "better to run the
7 risk of convicting an innocent man than to let a guilty one go";
8 and, although Hayat appears to be a "nice young man," considering
9 that the young Pakistani men who carried out the London bombings
10 also seemed like nice young men, "Can we, on the basis of what we
11 know, put this kid on the street? On the basis of what we know of
12 how people of his background have acted in the past? The answer is
13 no." (Mot. at 84-85; Ex. H to Mot. at 93.)

14 At the April 6 evidentiary hearing, Cote categorically and
15 convincingly denied making the hangman gestures that Lopez alleged
16 he made, and further testified that he did not have thoughts
17 attributed to him in the Atlantic Monthly article before the
18 commencement of the Hayat jury deliberations. Cote's testimony was
19 credible.¹

20 Subsequently, Lopez appeared at a further evidentiary
21 hearing on April 13, 2007. In a supplemental affidavit, and in the
22 April 13 evidentiary hearing, Lopez again accused Cote of making the
23 hangman gestures and "hang him" statement. (Second Lopez Aff. ¶ 4.)
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27 ¹ At the April 6 and 13, 2007 hearings, Hayat's counsel made
28 much ado about Cote's "misrepresentation" at the April 6 hearing
that the London subway bombings occurred after Hayat's trial
concluded. However, Cote's misrecollection of the date of the London
bombings does not adversely affect his credibility.

1 **a. Hangman gestures**

2 Hayat argues that the hangman gestures Cote allegedly
3 made "quite clearly suggest[] a prejudgment as to [Hayat]'s guilt
4 [and] extraordinary vindictiveness that Cote had sworn to disavow
5 during voir dire." (Mot. at 90.) Hayat further argues that the
6 gestures "suggest[] that [Cote] had not been truthful when he swore
7 that he would keep an open mind and not permit passion or prejudice
8 [to] sway his deliberations." (Id. at 90-91.)

9 Cote's testimony that he did not make a hangman gesture or
10 "hang him" statement is diametrically opposite Lopez's testimony on
11 these issues. Lopez testified on April 13, 2007, that Cote made a
12 hangman gesture and stated "hang him" in the jury deliberation room
13 on the second day of trial. Lopez authored two affidavits which
14 differ concerning how many jurors were present when Cote made the
15 alleged hangman gesture on the second day of trial. In Lopez's
16 affidavit dated April 27, 2006, she avers Cote made the gesture "in
17 the presence of [herself] and one other juror," whereas in Lopez's
18 second affidavit dated April 11, 2007, she avers that Cote made the
19 gesture "in the presence of [herself] and other jurors."² (Compare
20 Lopez Aff. ¶ 3 with Second Lopez Aff. ¶ 4.) During the April 13
21 hearing, Lopez explained this discrepancy, testifying: "when the
22 gesture was made, in the section that we were in next to the table,
23 it was just me, Mr. Cote and Mr. Monty Hall in the immediate area.
24 A few steps just behind us is where the rest of the jurors were.

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26 ² A redacted version of Lopez's April 27, 2006 affidavit was
27 filed on October 27, 2006, along with Hayat's motion for a new
28 trial. However, portions of the unredacted version of the affidavit
became part of the record for purposes of this motion at the April
13, 2007 hearing, when it was cited by counsel for the government
and the defense.

1 But they were not adjacent to us, or surrounding, or behind any of
2 us. They were adjacent but they were next to the restrooms."
3 It is puzzling why Lopez was precise in her April 27, 2006
4 affidavit, that Cote made the gesture "in the presence of [herself]
5 and one other juror [(Hall)]," and yet in her April 11, 2007
6 affidavit, stated that the gesture was made in the presence of
7 several other jurors. Moreover, although Hayat's counsel
8 interviewed other jurors post trial, no information has been
9 provided that any other juror saw Cote make a hangman gesture before
10 jury deliberations.

11 Lopez also declares in her April 11, 2007 affidavit, that
12 she "told [Cote during deliberations] that he . . . constantly made
13 the hangman gesture since the beginning of trial and expressed his
14 desire to find Hamid guilty," and that Cote responded she "was
15 crazy." (Second Lopez Aff. ¶ 6.) Lopez further declares that Mr.
16 Varno, a fellow juror, heard this accusation against Cote and
17 responded "that it wasn't Cote who was making the gesture, but that
18 Mr. Hall³ was making the gestures during trial."⁴ (Id.) Varno
19 connoted that Lopez was confused since she mistakenly identified
20 Cote as having done what Hall did. The record indicates Lopez could
21 be confused about the name of the juror who made hangman gestures
22 before jury deliberations. Lopez had previously confused the
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24 ³ Since Hall was an alternate juror, he did not participate
25 in the deliberations.

26 ⁴ Although these statements were made during deliberations,
27 the consideration of these statements does not violate Rule 606(b)
28 because the evidence is relevant on the issue of whether Cote was
truthful when he said he did not make the hangman gesture, and this
determination has probative value on whether Cote was deceitful
during voir dire.

1 identity of two jurors. In her April 27, 2006 affidavit, Lopez
2 misidentified juror Deborah Horn as juror Rebecca Harris, when Lopez
3 mistakenly said Harris was the author of a document concerning
4 Hepatitis C that was read during deliberations.⁵ (Lopez. Aff. ¶ 11;
5 see also Wedick Aff. ¶ 9, Berkeley-Simmons Aff. ¶ 18.)

6 Further, Lopez's explanation as to why she failed to tell
7 the trial judge about Cote making a hangman gesture on the second
8 day of trial is unconvincing. See Bristow v. Terhune, 2005 WL
9 1335240, at *12 (E.D. Cal. May 26, 2005) (indicating that the trial
10 court concluded that a juror's credibility is belied when the juror
11 "had numerous opportunities to talk to the court if there were
12 problems during deliberations, but she did not do so"). The
13 following exchange occurred on this point at the April 13 hearing:

14 The Court: You state in your April 11, 2007
15 affidavit that you conclude hangman gestures
16 were inappropriate. Did you conclude that when
17 you first observed it on the second day of
18 trial?

19 Ms. Lopez: Yes, I did.

20 The Court: When you used the word
21 "inappropriate," what does that mean to you?
22 What are you connoting?

23 Ms. Lopez: To me that was a very obvious way for
24 Mr. Cote to show his stand, or his opinion, so
25 early in the trial when it was not appropriate.
26 We were not in deliberations at the time, so for
27 him to show such a gesture I felt was unfair. I
28 felt that it compromised the integrity of the

24 ⁵ At the April 13 hearing, Lopez stated that she first
25 recalled Cote making the hangman gesture on the second day of trial,
26 but that he continued to make the gesture as the trial continued,
27 and into deliberations. It is possible that, consistent with Cote's
28 testimony at the April 6 hearing and consistent with Varno's
statement, only Hall made the gesture prior to deliberations. If
Cote made hangman gestures *during* deliberations, Lopez is probably
confused about which juror, Hall or Cote, made the gesture *prior* to
deliberations.

1 case.

2 The Court: Did you think it was wrong?

3 Ms. Lopez: Pardon?

4 The Court: You thought it was wrong?

5 Ms. Lopez: I know it was wrong.

6 The Court: Why didn't you tell me about it?

7 Ms. Lopez: I should have. That was a mistake on
8 my part.

9 The Court: Why didn't you?

10 Ms. Lopez: I don't have an answer for that. I
just know that I was wrong in not reporting it.

11 Additionally, Lopez's version of what happened is not
12 credited because Lopez states in her April 27, 2006 affidavit that
13 she was not truthful when she was polled about the jury verdict.
14 (Lopez Aff. ¶ 13.) Lopez declares that when she was polled on April
15 24, 2005, she "responded to the Court that [she] agreed with the
16 verdict," when, "[i]n fact, [she] did not." (Id.) Each juror was
17 polled individually and answered affirmatively when questioned
18 whether the guilty verdict was his or her verdict; it is astonishing
19 that Lopez said otherwise shortly after affirming that the verdict
20 was her verdict.⁶ See generally Bristow, 2005 WL 1335240, at *12
21 (stating that a state "appellate court concluded that the absence of

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23 ⁶ Further, Lopez's averment in her April 27 affidavit that
24 she "deeply regret[s her] decision" indicates she may desire to get
25 the guilty verdict reversed. (Lopez Aff. ¶ 13.) See Chambers v.
26 Cockrell, 2003 WL 22017036, at *25 (N.D. Tex. Aug. 26, 2003)
(quoting the trial court's finding that a juror "simply had a change
of heart regarding the jury's verdict of death, and her testimony at
the motion for new trial hearing was merely an attempt to get the
case reversed").

27 Although evidence of a juror's post-trial regret or remorse
28 about a verdict is not admissible to impeach the verdict, Lopez's
regret is not being considered for that purpose; rather, it is being
considered on whether she has a motive to get the verdict reversed.

1 details in [the affidavit of a juror who alleged she did not agree
2 with the jury's verdict but was intimidated by her fellow jurors],
3 her failure to apprise the court during deliberations of any
4 inappropriate behavior, and her failure to speak up when
5 individually polled, justified the trial court's conclusion that no
6 juror misconduct occurred.").

7 For all of the stated reasons, Lopez's version of who made
8 hangman gestures before deliberations is not believed. Therefore,
9 Hayat has not proved that Cote made hangman gestures or stated "hang
10 him" prior to jury deliberations.⁷

11 A remaining issue is whether, if another juror made a pre-
12 deliberation hangman gesture, that gesture needs to be investigated.
13 The Seventh Circuit held otherwise in U.S. v. Kimberlin, 805 F.2d
14 210, 243 (7th Cir. 1986), where "[o]ne juror, during trial and in
15 presence of all others, said 'They ought to hang him now, so we can
16 go home,' or words to that effect." The district court concluded
17 that the hangman statement allegation did "not require a hearing
18 because the only types of inquiry which would aid the court in
19 assessing possible effects of such alleged conduct are not permitted
20 by [Rule 606(b)]." Id. The Seventh Circuit agreed, stating, "Rule
21 [606(b)] would not permit a juror to testify to the effect of the
22 communication upon his [or her] mind or emotions, or concerning his
23 [or her] mental processes in connection with the verdict. Thus, a
24 hearing would be fruitless unless these statements, if made, would
25 be presumed to be prejudicial." Id. at 244.

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28 ⁷ Rule 606(b) prohibits the Court from probing into whether
or not Cote, or any other juror, made a hangman gesture *during*
deliberations.

1 "The important thing is . . . that each juror ke[pt] an
2 open mind until the case [was] submitted to the jury. . . . What is
3 involved here is the premature discussion among [certain] jurors
4 themselves about the case. Assuming that there was juror
5 misconduct, it is still true that not every incident of juror
6 misconduct requires a new trial." Klee, 494 F.2d at 396. A
7 question is whether the jurors made up their minds about Hayat's
8 guilt before deliberation. The record does not so indicate. The
9 jury deliberated for ten days, and during the course of their
10 deliberations, requested guidance from the court on various issues
11 (RT 4655, 4732), and requested a replay of Hayat's videotaped
12 confessions and the testimony of one of the FBI investigators (RT
13 4558, 4782). See Klee, 494 F.2d at 396 (denying new trial premised
14 on premature deliberations and expressions of guilt by nine jurors
15 where, among other things, the trial judge "correctly observed that
16 'the only genuine issue in dispute was defendant's state of mind. On
17 this point the jury demonstrated its open-mindedness by requesting
18 re-reading of the instructions on willfulness before bringing in its
19 verdict.'"). Therefore, Hayat's motion for a new trial on this
20 ground is denied.

21 **b. Statements to Atlantic Monthly**

22 Hayat alleges that in a post-trial interview, Cote made
23 several inappropriate statements to Amy Waldman, a reporter for the
24 Atlantic Monthly. (Mot. at 84-85.) Hayat argues these "statements
25 suggest[] that, when deliberating, [Cote] likened [Hayat] to the
26 young Pakistani men responsible for the London subway bombings [and
27 that this] suggests that Cote flatly disregarded his assurance that
28 he harbored no prejudices against Pakistanis or Muslims, as well as

1 his promise to disregard whatever he had read in the media." (Id.
2 at 91.) Hayat also argues the statements indicate Cote "was
3 untruthful when he assured the Court and the parties that during
4 deliberations, he would consider only the evidence adduced in *this*
5 case and that he would 'absolutely' disregard any media reports."
6 (Id. at 91-92.)

7 Hayat further contends that Cote's statements regarding
8 "new rules of engagement" and "not want[ing] to see the government
9 lose its case," and that it was "absolutely" better to run the risk
10 of convicting an innocent man than letting a guilty one go free,
11 "suggest that, during voir dire, Cote had concealed the impact that
12 the allegations of terrorism would have on his thinking, and that he
13 had ignored his oath[] to apply a presumption of innocence and to
14 require the government to prove its charges beyond a reasonable
15 doubt." (Id. at 92.)

16 The government counters that Cote's alleged statements
17 related to the London bombings are "double hearsay and therefore of
18 questionable reliability"; the statements are barred by Rule 606(b);
19 and the meaning of the statements and what they reveal about Cote's
20 "mindset during deliberations, or voir dire, is uncertain" since
21 "the mere fact that [Cote] recalled the London bombings or that some
22 of the bombers were Pakistani does not suggest he is prejudiced
23 against Pakistanis or Muslims." (Opp'n at 146, 147, 148). The
24 government further contends that the statements fall "woefully short
25 of constituting substantial evidence that [Cote] purposefully
26 concealed a bias against [Hayat] during voir dire or otherwise
27 purposefully lied to the parties and the Court when he promised to
28 base his decisions only on the evidence adduced at trial." (Id. at

1 152-53.)

2 With regard to Cote's alleged statements related to new
3 rules of engagement, the government argues the statements are double
4 hearsay; that "Rule 606(b) bars consideration of the[se] statements
5 to prove whether [Cote] understood the law regarding presumption of
6 innocence and burden of proof, followed that law, or even refused to
7 do so"; and that "an examination of all the quoted foreman
8 statements, in context, makes it clear that [Cote] did not ignore
9 his oath [or] misapprehend the law." (Id. at 154, 155, 156.)

10 Even assuming Cote made all of the statements in the
11 Atlantic Monthly article, when read as a whole, the article reveals
12 that the jurors, and Cote himself, thoroughly and thoughtfully
13 deliberated regarding Hayat's guilt or innocence.⁸ The statements

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15 ⁸ The article suggests that the jurors had great difficulty
16 in deciding whether to convict Hayat. For example, the article
states:

17 Hayat's intent was the last issue the jurors discussed,
18 when they had wrapped everything else up. To Cote, it
19 was just a subset of the main charges, but he called it
20 "the most perplexing question in the entire indictment"
21 - the least damning, legally speaking, from his
22 perspective, yet perhaps the most weighty morally.
23 After the judge denied their request for a dictionary,
24 the jurors spent an entire morning wrestling with what
the word *intending* meant. Starr Scaccia said she was
the only juror who was truly convinced that Hayat would
have carried out an act of terrorism; her fellow jurors
"didn't feel he had the guts to do it." The truth, Cote
kept saying to me, was that they just didn't know.

25 This was their conundrum: Do you send a man to prison -
26 ostensibly for training and lying - when the real
27 question is whether he is a threat, and most of you
28 don't think he is? "That's what made the verdict so
tough," Cote said. "Because we thought in the gut,
'Maybe he may not do it.'" But what Cote called the
"literal world," defined by the boundaries of law and
evidence, did not allow for shades of gray.

1 in the article do not reveal that Cote had a racial or religious
2 bias against Hayat, that he was dishonest during voir dire, or that
3 he was an unfair or impartial juror.

4 **c. Statements during deliberations**

5 Hayat supports his contention that Cote made racist
6 remarks during deliberations with the affidavits of Lopez, juror

7
8 During our interview, Cote said several times that the
9 jurors were not asked to decide whether Hayat was
10 capable of engaging in terrorism. "Believe it or not,
11 that's the only way I can sleep nights," he said. And
12 yet they did decide it, Cote said, concluding that the
evidence suggesting that Hayat would act - the
scrapbook, the prayer, and so on - was stronger than
the evidence that he would not.

13 (Ex. H to Mot. at 92);

14 The "punch line," Cote said, was that he thought these
15 cases were more than a jury could handle. "We're not
16 being asked, 'Did the defendant commit the crime?' -
17 whether it's larceny, murder, whatever. Now you're
being asked, 'Is the defendant capable of doing a
crime?' And I don't think that that is in the . . .
level of understanding of the juror."

18
19 The doubt "works on you," added Cote, who used the
20 phrase "the haunt." What haunted him was having to
weigh, with inconclusive evidence, the risk that the
21 man before the jurors was dangerous against the
countervailing risk of depriving an innocent man of his
22 liberty. He and his fellow jurors had no extraordinary
23 talents to bring to bear on that task; they were
Americans who had been selected for jury duty because
24 of their very ordinariness. As Cote saw it, they were
ill-equipped to handle what was being asked of them.

25 (Id. at 92-93);

26 This preventive approach, Cote said, means that "just
27 as there are people in prison who never committed the
28 crime, this may also happen. *Not this particular case,*
I'm saying, but future cases."

(Id. at 93) (emphasis added).

1 Theresa Berkeley-Simmons and investigator James Wedick, where they
2 explain that during deliberations, in a discussion about government
3 witness Naseem Khan's misidentification of Ayman al-Zawihiri, a
4 well-known alleged terrorist, in Lodi, California, Cote stated that
5 all Egyptians look alike when dressed in the same garb. (Id. at 81-
6 82; Lopez Aff. ¶ 6; Berkeley-Simmons Aff. ¶¶ 4-14; Wedick Aff. ¶ 6.)
7 Hayat argues that this statement and Cote's "other inappropriate
8 racial remarks" reveal that Cote harbored a racial and religious
9 bias. (Mot. at 83; Berkeley-Simmons Aff. ¶ 13; Lopez Aff. ¶ 6.)
10 Hayat contends the "statements suggest that [Cote] had not been
11 truthful when, in voir dire, he stated that he could remain
12 impartial and that he harbored no prejudice against Muslims,
13 Pakistanis, Pakistani-Americans or those with Islamic beliefs."
14 (Mot. at 91.)

15 The government counters, first arguing that "given the
16 context and nature of the statement, [it] does not believe that the
17 statement evidences an 'actual bias' on the part of [Cote] such that
18 it is admissible as an exception to Rule 606(b)." (Opp'n at 143-
19 44.) The government explains "it is far from clear whether Cote's
20 reported statement is a 'racist statement' or what it reveals about
21 [Cote's] views in general with respect to individuals of different
22 races, nationalities or creeds." (Id. at 143.) The government
23 contends that "the remark related to a legitimate topic of
24 discussion by the jury: whether the cooperating witness had
25 misidentified Al Zawihiri in Lodi. Indeed, according to Cote, he
26 was trying to explain that identification of individuals can be
27 problematic." (Id.)

1 The government further argues that "assuming that [Cote's]
2 statement related to individuals looking alike is admitted as some
3 evidence of potential bias, and even assuming its veracity, it is
4 clear that the statement does not constitute substantial evidence of
5 bias by [Cote] sufficient to warrant a further evidentiary hearing,
6 or come close to establishing actual bias on the part of [Cote]."
7 (Id. at 144.)

8 The only concrete example that Hayat provides to support
9 his contention that Cote made racist remarks during trial (that all
10 Egyptians wearing the same garb look alike) is not racist, in light
11 of the context in which it was made, since Cote was trying to
12 explain how Khan could have misidentified certain individuals.

13 **d. Telephone call to alternate juror Watanabe**

14 Hayat alleges that on April 20, 2006, Cote telephoned
15 alternate juror Marta Watanabe and asked her a question about Lopez.
16 (Mot. at 84; Wedick Aff. ¶ 8.) Hayat argues this communication
17 "violated the Court's instructions and admonitions on not
18 communicating with any outside party about the case, . . .
19 misconduct which . . . gives rise to a finding of disqualifying
20 bias." (Mot. at 92.)

21 The government responds that "[a] review of the actual
22 allegations makes it clear that the communications between Cote and
23 Watanabe, in fact, were ex parte contacts and that there is no
24 reasonable possibility of prejudice to [Hayat]." (Opp'n at 177.)
25 The government asserts the conversation did "not pertain to any fact
26 in controversy in the prosecution or any law applicable to the
27 case," and "Watanabe did not impart any information germane to
28 deliberations to foreman Cote or vice versa." (Id. at 178, 180.)

1 Since there is no indication that Cote's telephone call to
2 Watanabe constituted *prejudicial* misconduct, Hayat's motion is
3 denied on this ground.

4 **e. Media reports in deliberation room**

5 Hayat alleges that one day during deliberations, Cote
6 talked with other members of the jury about a media report he had
7 heard relating to the trial. (Mot. at 83.) Specifically,
8 Berkeley-Simmons avers that "[a]t one point during deliberations,
9 Mr. Cote began to discuss something he had learned from media
10 reports about Hayat's attorney, Wazhma Mojaddidi." (Berkeley-
11 Simmons Aff. ¶ 14.) Additionally, Lopez avers in her April 27, 2006
12 affidavit, that "during deliberations Mr. Cote shared with jury
13 members that he overheard something concerning a media report
14 relating to the trial. The information he shared was clearly not
15 something that was provided during testimony." (Lopez Aff. ¶ 8.)
16 In Lopez's April 11, 2007 affidavit, she further avers, for the
17 first time, that:

18 Mr. Cote often discussed topics that he read
19 about in the media with the other jurors. . . .
20 One day during trial and during a break in the
21 jury room, Cote told the jury that he had read
22 about government attorney, David Deitch. He
23 said that Deitch was an attorney from Washington
24 D.C. who had a good record in these 'types of
25 cases,' and that if the government would let him
26 lead during trial they would win the case. When
27 he made this comment, I did not want to be a
28 part of the conversation and so I walked out and
29 went to the restroom. When I returned, Mr. Cote
30 was telling the jurors that it didn't matter
31 whether defense counsel, Wazhma Mojaddidi, won
32 the case because she had stated that she would
33 not take any more cases like this one.

34 (Second Lopez Aff. ¶ 8.)

1 Hayat argues this discussion violated the court's
2 instruction concerning media reports and "injected into
3 deliberations extrinsic information relating to the case." (Mot. at
4 99.) The government counters that even if the allegations are
5 assumed to be true, they "fail to demonstrate that [the jury] was
6 exposed to any sort of prejudicial extrinsic material." (Opp'n at
7 170.) The government argues "there is no reasonable possibility
8 that the extrinsic media material from . . . Cote could have
9 affected the verdict." (Id. at 171.)

10 Even assuming the truth of the allegations regarding
11 Cote's statements and conduct, given their context and content,
12 there is no reasonable possibility that they affected the verdict.

13 **f. Cumulative effect**

14 Hayat argues that when viewed collectively, Cote's
15 statements and actions reveal that Cote harbored a disqualifying
16 bias against Hayat. (Reply at 6; April 6 and 13, 2007 hearings.)
17 The government rejoins that the allegations of Cote's bias, even
18 when viewed collectively, do not substantiate Hayat's claim. (Opp'n
19 at 158.)

20 The determination as to whether a juror is biased must be
21 founded on an examination of all relevant evidence of bias and
22 misconduct in the aggregate rather than in isolation. Green v.
23 White, 232 F.3d 671, 678 (9th Cir. 2000). However, considering all
24 evidence of Cote's alleged bias and misconduct, Hayat has not shown
25 that Cote was not a fair and impartial juror. Therefore, Hayat is
26 not entitled to a new trial based on Cote's alleged bias or
27 misconduct.

1 **2. Juror Deborah Horn⁹**

2 Hayat also contends that juror Deborah Horn "committed
3 misconduct when she injected into a critical stage of the
4 deliberations written material prepared outside the jury room that
5 contained factual information extrajudicially obtained." (Mot. at
6 6.) Specifically, investigator Wedick avers that Horn stated that
7 "on Monday, April 24, 2006, while deliberations were still in
8 progress, she brought into the jury room a typewritten 6-page
9 statement written in 20 point font that she had prepared over the
10 previous weekend" and that "she read the typewritten statement to
11 the other jurors." (Wedick Aff. ¶ 9; see also Lopez Aff. ¶ 11;
12 Berkeley-Simmons Aff. ¶ 18.) Wedick further avers that Horn told
13 him that the typewritten statement that "she had typed on her
14 computer," "described the impact of the trial on her health and
15 mental condition" and "contained information concerning Hepatitis C,
16 which related to [Hayat]'s testimony that he had cared for his
17 mother when afflicted by the disease." (Wedick Aff. ¶ 9.)

18 The government argues Horn's letter "constituted intrinsic
19 statements related to jury deliberations, which are incompetent to
20 challenge the verdict." (Opp'n at 175.) The government contends
21 that "the mere fact that a juror creates a writing outside of the
22 jury room about a case does not mean that the writing, even if used
23 during deliberations, constitutes improper extrinsic evidence. If
24

25 ⁹ Hayat also argues it was misconduct for juror Starr
26 Scaccia to tell other jurors about a news story regarding one of the
27 dismissed jurors. (Mot. at 99.) However, Hayat has not established
28 a "'reasonable possibility' that th[is] evidence affected the jury's
deliberations." U.S. v. Plunk, 153 F.3d 1011, 1025 (9th Cir. 1998),
overruled on other grounds by U.S. v. Hankey, 203 F.3d 1160, 1169
n.7 (9th Cir. 2000).

1 the writing represents matters properly intrinsic to jury
2 deliberations, such as the kind of common knowledge which most
3 jurors are presumed to possess, the writing is not considered
4 extrinsic evidence at all.” (Id. at 173-74.) The government
5 contends that even assuming Horn made the alleged statements, “all
6 such statements plainly represented a permissible summation of a
7 juror’s intrinsic thoughts about the case, including her personal
8 experience and general knowledge with respect to the illness of
9 hepatitis, and her application of this experience to making
10 credibility determinations related to Hamid Hayat’s defense.” (Id.
11 at 175.)

12 A court examining a claim of a juror’s improper use of
13 extrinsic evidence must determine whether the particular materials
14 that a juror allegedly brought into the jury room are, in fact,
15 improper extrinsic materials, or are merely “the kind of common
16 knowledge which most jurors are presumed to possess.” Rodriguez v.
17 Marshall, 125 F.3d 739, 745 (9th Cir. 1997), *overruled on other*
18 *grounds by* Payton v. Woodford, 299 F.3d 815 (9th Cir. 2002); U.S. v.
19 Bagnariol, 665 F.2d 877, 888 (9th Cir. 1981) (discounting claim of
20 prejudice where extraneous information was something “any reasonable
21 juror already knew”).

22 Jurors are permitted to utilize their life experiences and
23 common knowledge during deliberations. Hard v. Burlington N. R.R.
24 Co., 870 F.2d 1454, 1462 (9th Cir. 1989); Grotemeyer v. Hickman, 393
25 F.3d 871, 878, 879 (9th Cir. 2004) (“The mere fact that the jury
26 foreman brought her outside experience [as a medical doctor] to bear
27 on the case [did not] violate Grotemeyer’s constitutional right to
28 confrontation. . . . That a physician is on the jury does not

1 deprive a defendant of his constitutional right to an impartial
2 jury, even though the physician will doubtless have knowledge and
3 experience bearing on any medical questions that may arise.").
4 "Many trials, including this one, boil down to a question of who is
5 lying. It is hard to know who is lying without some understanding,
6 based on past personal experience, of the circumstances of the
7 witnesses." Grotemeyer, 393 F.3d at 879. Since Horn's statements
8 comprised her non-extraneous background experiences and "related
9 merely to [her] own internal mental processes" concerning jury
10 deliberation issues, they constituted intrinsic statements involved
11 with matters internal to the jury deliberation process. Statements
12 regarding such matters are not admissible under Rule 606(b) and are
13 insufficient to support Hayat's motion. U.S. v. Vig, 167 F.3d 443,
14 450 (8th Cir. 1999).

15 **B. Lack of Evidence to Corroborate Confession**

16 Hayat also argues he is entitled to a new trial because
17 the government failed to meet the requirements of the "corpus
18 delecti" rule requiring independent proof that the crime charged was
19 actually committed. (Mot. at 5 (citing Smith v. U.S., 348 U.S. 147
20 (1954)).) Hayat contends that "the key evidence offered as
21 independent corroboration of the two necessary elements of the
22 charged offense - Dr. Mohammed's claim that Hayat possessed a jihadi
23 state of mind and Eric Benn's sixty to seventy percent probability
24 estimation that a training camp existed in Balakot, Pakistan - was
25 legally inadmissible and probatively worthless," and that therefore,
26 the court should exercise its Rule 33 power to grant a new trial.
27 (Mot. at 5.) The government disagrees, arguing there was sufficient
28 evidence to corroborate both Hayat's jihadi state of mind, and his

attendance at a Pakistani training camp. (Opp'n at 1-2.)

"All elements of [an] offense must be established by independent evidence or corroborated admissions." Smith v. U.S., 348 U.S. 147, 157 (1954). "[O]ne available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused." Id. The corroborating, independent evidence need not be overwhelming to sustain a conviction. U.S. v. Taylor, 802 F.2d 1108, 1117 (9th Cir. 1986).

1. Mens rea

Hayat argues that the indictment charged him with providing material support to terrorists "knowing and intending" that such support was to be used to commit acts of terrorism and that, therefore, "[h]aving alleged that Hayat possessed the intent to personally wage violent jihad in the United States, the government had to prove that state of mind or suffer an acquittal." (Mot. at 35, 36.) Hayat contends that Mohammed's testimony cannot be used as corroborating evidence of Hayat's intent because it is prohibited by Federal Rule of Evidence 704(b) since Mohammed opined that carrying the supplication meant that Hayat had the state of mind required to commit the charged crimes. (Id. at 37-38.) Hayat further argues that Mohammed's testimony regarding the supplication was inadmissible because it was beyond the scope of his expertise, unreliable, and not helpful to the jury. (Id. at 39.) Hayat argues that when Mohammed's testimony bearing on Hayat's state of mind is stricken from the record, there is no evidence that independently corroborates Hayat's mens rea. (Id. at 44.)

1 The government responds that "the defense mistakenly
2 argues that the government assumed a higher burden of proof by
3 charging [Hayat]'s intent in the conjunctive, 'knowing and
4 intending'" and that it was entitled to prove one or both of the
5 mens rea theories set forth in § 2339A. (Opp'n at 26.) The
6 government further argues that Dr. Mohammed's testimony was
7 permissible under Rule 704(b) because it did not necessarily compel
8 a conclusion concerning Hayat's mens rea. (Id. at 42.) The
9 government contends that "the Court properly admitted Dr. []
10 Mohammed's expert testimony related to the jihadi supplication. Dr.
11 Mohammed was wholly qualified to opine regarding the meaning of the
12 Arabic supplication; his opinion was reliable and obviously helpful
13 to the jury; and he did not impermissibly opine that [Hayat] himself
14 had the requisite criminal mens rea." (Id. at 1-2; 53.)

15 An indictment can charge an element in the conjunctive and
16 the government's proof can be in the disjunctive. U.S. v. Booth,
17 309 F.3d 566, 572 (9th Cir. 2002) ("When a statute specifies two or
18 more ways in which an offense may be committed, all may be alleged
19 in the conjunctive in one count and proof of any one of those
20 conjunctively charged acts may establish guilt."). Additionally,
21 the Court has wide discretion in its determination to admit and
22 exclude expert testimony. Hamling v. U.S., 418 U.S. 87, 108 (1974);
23 U.S. v. Chang, 207 F.3d 1169, 1171 (9th Cir. 2000) ("We view '[t]he
24 admissibility of expert testimony [as] a subject peculiarly within
25 the sound discretion of the trial judge, who alone must decide the
26 qualifications of the expert on a given subject and the extent to
27 which his opinions may be required.'").

1 Mohammed's testimony was not inadmissible under Federal
2 Rule of Evidence 704(b), which prohibits an expert witness from
3 stating an opinion or inference as to whether a defendant did or did
4 not have the mental state or condition constituting an element of
5 the crime charged, because Mohammed did not testify that Hayat had a
6 particular mens rea, and his testimony did not necessarily compel a
7 conclusion regarding Hayat's mens rea.¹⁰ See U.S. v. Gonzales, 307
8 F.3d 906, 911 (9th Cir. 2002) ("[The expert witness] never directly
9 and unequivocally testified to [the defendant's] mental state; he
10 never stated directly that [the defendant] had the intent to
11 distribute. Rather, he indicated his firm conviction that a
12 'person' possessing the evidence in question would, in fact, possess
13 the drugs for the purpose of distributing. Even if the jury
14 believed the expert's testimony, the jury could have concluded that
15 [the defendant] was not a typical or representative person, who
16 possessed the drugs and drug paraphernalia involved.").
17 Additionally, Mohammed's testimony was not beyond the scope of his
18 expertise, unreliable, or unhelpful to the jury. Therefore,
19 Mohammed's testimony was not improperly admitted, and Hayat has not
20 shown that the government offered insufficient independent
21 corroborating evidence.

22 **2. Actus reus**

23 Hayat also argues that the charged actus reus was not
24 proven or corroborated by admissible or probative independent
25 evidence. (Mot. at 44.) Hayat contends "[t]he only evidence
26 arguably capable of corroborating Hayat's attendance at the camp
27 came from the two opinions of Eric Benn" and that testimony was not
28

¹⁰ This issue was not raised during trial.

1 reliable and was not independent since it was based on Hayat's
2 confessions. (Id.)

3 The government responds that there was sufficient evidence
4 to legally corroborate Hayat's confession that he attended a
5 jihadist camp in Balakot with the requisite intent and attempted to
6 conceal the same with the requisite intent. (Opp'n at 70.) The
7 government contends that Hayat's confession was corroborated by: his
8 possession of a jihadi supplication; his multiple recorded
9 conversations with Khan related to his belief in jihad and desire to
10 attend a jihadi camp; testimony regarding the existence of camps in
11 Pakistan (including the Balakot area) by Eric Benn and Hassan Abbas;
12 Hayat's self-made jihadi scrapbook; and Hayat's possession of
13 numerous well-known jihadi publications. (Id. at 64-70.)

14 The government is correct that sufficient independent
15 corroborating evidence is in the record on Hayat's actus reus.
16 Therefore, Hayat is not entitled to a new trial on this ground.

17 **C. Sixth Amendment Right to Confront Witnesses and Pursue**
18 **Exculpatory Evidence**

19 Hayat argues he is entitled to a new trial because "he was
20 denied his Sixth Amendment right to pursue exculpatory evidence from
21 three witnesses - chief prosecution witness Naseem Khan, defense
22 expert witness Anita Weiss, and proffered defense expert James
23 Wedick." (Mot. at 5.) The government disagrees, contending that
24 Hayat was not denied his sixth amendment right to confront Khan,
25 Weiss, or Wedick. (Opp'n at 2-4.)

26 Under the Sixth Amendment, Hayat has a right to confront
27 the witnesses against him. Pointer v. Tex., 380 U.S. 400, 401
28 (1965). "The confrontation clause, however, does not guarantee

unbounded scope in cross-examination." U.S. v. Lo, 231 F.3d 471, 482 (9th Cir. 2000). A confrontation clause violation will only be found if an exclusionary ruling "limits relevant testimony, prejudices the defendant, and denies the jury sufficient information to appraise the biases and motivations of the witness." Id. (internal quotation marks and modifications omitted). "Evidence erroneously admitted in violation of the Confrontation Clause must be shown harmless beyond a reasonable doubt, with courts considering the importance of the evidence, whether the evidence was cumulative, the presence of corroborating evidence, and the overall strength of the prosecution's case." U.S. v. Bowman, 215 F.3d 951, 961 (9th Cir. 2000).

The Sixth Amendment also guarantees Hayat the right to present his own witnesses to establish a defense. Wash. v. Tex., 388 U.S. 14, 19 (1967). "[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." Crane v. Ky., 476 U.S. 683, 690 (1986) (internal quotation marks omitted).

However, the right to present witnesses is also not absolute. Alcala v. Woodford, 334 F.3d 862, 877 (9th Cir. 2003). "While the right to present a defense is fundamental, the state's legitimate interest in reliable and efficient trials is also compelling." Id. (internal citations, quotation marks, and brackets omitted).

In weighing the importance of evidence offered by a defendant against the state's interest in

1 exclusion, the court should consider the
2 probative value of the evidence on the central
3 issue; its reliability; whether it is capable of
4 evaluation by the trier of fact; whether it is
5 the sole evidence on the issue or merely
6 cumulative; and whether it constitutes a major
7 part of the attempted defense. A court must
8 also consider the purpose of the [evidentiary]
rule; its importance; how well the rule
implements its purpose; and how well the purpose
applies to the case at hand. The court must
give due weight to the substantial state
interest in preserving orderly trials, in
judicial efficiency, and in excluding unreliable
or prejudicial evidence.

9 Miller v. Stagner, 757 F.2d 988, 994-95 (9th Cir. 1985) (internal
10 citation omitted).

11 **1. Right to Cross-Examine Naseem Khan**

12 Hayat contends that he "was erroneously barred from
13 pursuing several proper lines of cross-examination, all of which
14 could have generated critical evidence refuting the government's
15 contention that he attended a jihadi training camp." (Mot. at 5.)
16 Hayat contends that "[b]ecause Khan gave testimony on direct
17 examination that concerned the contents of all of his conversations
18 with Hayat, the defense was entitled to cross-examine Khan
19 concerning what was said in any and every conversation that the two
20 had." (Id. at 50.) Hayat argues the denial of his Sixth Amendment
21 right to cross-examine Khan was prejudicial and merits the grant of
22 a new trial. (Id. at 54.)

23 The government counters that "contrary to [Hayat]'s
24 claims, the Court did not impermissibly limit his ability to
25 cross-examine Naseem Khan." (Opp'n at 2.) The government further
26 argues that Hayat "is precluded from raising these issues at this
27 point because, at the time the Court sustained the government's
28 objections, [Hayat] made no effort to demonstrate why the challenged

1 evidence was admissible or what the challenged evidence would have
2 revealed." (Id.)

3 At trial, on direct examination of Khan, the government
4 asked Khan about his discussions with Hayat regarding Tablighi
5 Jamaat. (RT 1081-82.) On cross-examination, when defense counsel
6 questioned Khan about whether Hayat told him that he was at a
7 Tablighi Jamaat camp, the government objected to the question on
8 foundation and hearsay grounds. (RT 1792-93.) After a bench
9 conference, the court sustained the hearsay objection, ruling: "The
10 hearsay rule allows the government to introduce a statement against
11 your client, but it does not allow you to use a statement . . . for
12 the truth of the matter asserted therein in favor of your client.
13 That is hearsay." (RT 1795.)

14 Defense counsel then asked Khan whether he believed that a
15 Tablighi Jamaat camp "has anything to do with terrorism," and the
16 government objected on foundation, relevance, and Rule 403 grounds.
17 (RT 1795-96.) The court sustained the foundation objection. (RT
18 1796.)

19 Later, defense counsel asked Khan whether, during a
20 conversation he had with Hayat on October 7, 2003 while Hayat was in
21 Pakistan, Hayat told him "that he never intended on going to a camp,
22 and he was lying to [Khan] all along." (RT 1802.) The government
23 objected on foundation and hearsay grounds, and moved to strike.
24 (RT 1802.) The court sustained the objection and struck the
25 question. (RT 1802.)

26 **a. Tablighi Jamaat**

27 Hayat argues he "was entitled on cross-examination to
28 question Khan as to what [Hayat] had said about Tablighi Jamaat,

1 because the prosecution had specifically addressed the question on
2 Khan's direct [examination]." (Mot. at 50.) "The government could
3 not introduce testimony by Khan concerning statements by [Hayat],
4 and then shield that testimony from the scrutiny of cross-
5 examination by claiming that it alone was legally entitled to gain
6 admission of statements of [Hayat]." (Id. at 51.) Hayat argues
7 "[i]t was extremely important that Khan be required to reveal on
8 cross examination that Hayat's statements to Khan about his
9 experience in attending Tablighi Jamaat was entirely religious in
10 nature and had nothing to do with violence and terrorism." (Id. at
11 52.)

12 Hayat contends that once the government "opened the door"
13 to the line of questioning, Hayat had a right to introduce evidence
14 on the same issue to rebut any false impression that might have
15 resulted from the earlier admission. (Id. at 51 (citing U.S. v.
16 Whitworth, 856 F.2d 1268, 1285 (9th Cir. 1988); U.S. v. Wales, 977
17 F.2d 1323 (9th Cir. 1992); U.S. v. Beltran-Rios, 878 F.2d 1208,
18 1211-13 (9th Cir. 1989)).)

19 The government responds that the court's ruling excluding
20 Hayat's cross-examination regarding Tablighi Jamaat is subject to a
21 plain error test because Hayat failed to make a proffer at trial
22 concerning what the anticipated testimony would be or what legal
23 basis there was for its admission, (opp'n at 76, 77) and that
24 "[w]here a defendant fails to preserve the issue by stating a
25 proffer and setting forth the grounds for the argument in district
26 court, the review is for plain error." (Opp'n at 73 (citing U.S. v.
27 Reese, 2 F.3d 870, 892 (9th Cir. 1993)).) The government argues
28 that here, there was no error since "[t]he foundation and hearsay

1 objections were wholly appropriate." (Opp'n at 78, 81.) The
2 government also notes that even if the court assumes that the cross
3 examination was properly responsive to the Tablighi Jamaat subject
4 raised by the government on direct examination, the trial court
5 still had discretion to limit inquiry on cross-examination, since
6 "[o]nce the door is opened, a curative admission is allowed only if
7 necessary 'to introduce evidence on the same issue to rebut any
8 false impression that might have resulted from the earlier admission
9 [of inadmissible evidence]," and "there is no indication that Mr.
10 Khan's testimony was false." (*Id.* at 79 (quoting *Whitworth*, 856
11 F.2d at 1285).) The government additionally argues there was no
12 plain error since "to the extent that there was any kind of
13 misconception concerning the arguably misleading statements by
14 Mr. Khan, there was no harmful impact on [Hayat] in light of the
15 whole record" and because "Khan's knowledge of Tablighi Jamaat is
16 not a matter of any relevance to the issues to be decided." (Opp'n
17 at 80, 83.)

18 Although Hayat argues that the evidence was critically
19 important and that "[h]ad cross-examination not been restricted, it
20 would have . . . countered the suggestion . . . that [Hayat's]
21 attendance at Tablighi Jamaat had been related to violent jihad,"
22 even Hayat acknowledges that his expert, Anita Weiss, later
23 testified that Tablighi Jamaat had no connection with terrorism.
24 (Mot. at 54, 52 (citing RT 4125-26).) Therefore, even assuming it
25 was error to preclude Hayat from cross-examining Khan regarding
26 Tablighi Jamaat, the error was harmless.

27 **b. Refusal to Attend Terrorist Camp**

28 Hayat further argues that he was entitled to ask Khan

1 whether Hayat told him "that he never intended to go to a
2 camp, and that he was lying to [Khan] all along." (Mot. at 52.)
3 Hayat contends that question "was the single most important question
4 that Hayat's counsel put to Khan on cross." (Id.) Hayat argues the
5 government "opened the door" to this line of questioning and there
6 was no legal basis for sustaining the government's hearsay objection
7 since the question was subject to the state of mind hearsay
8 exception in Federal Rule of Evidence 803(3). (Id. at 53.)

9 Hayat contends that the information was critically
10 important because it would have "established that Hayat told Khan
11 that he had no intention of attending a training camp." (Id. at
12 54.) Hayat argues that "had the jury learned that in October, 2003,
13 Hayat had finally stated to Khan in no uncertain terms that he was
14 not going to a camp and that his previous suggestions to the
15 contrary were untrue, it very likely would have concluded that
16 [Hayat] was a slacker and blowhard who had no desire to train for,
17 much less commit, acts of jihadi violence." (Reply at 24.)

18 The government first notes that the objection that Hayat
19 challenges with regard to the October 7 conversation, was actually
20 the second objection that was made at trial. (Opp'n at 84.) When
21 defense counsel first asked Khan on cross-examination about the
22 October 7 conversation, the government objected on hearsay grounds.
23 (Id. (citing RT 1321).) Defense counsel responded that the
24 testimony was being offered to show the effect of the statement on
25 the listener. (Id.) The court then sustained the objection because
26 the effect on the listener was not relevant. (Id.)

27 The government argues that when the second objection was
28 made to defense counsel's cross-examination of Khan regarding the

1 October 7 conversation, defense counsel "did not ask for a bench
2 conference, try to make a proffer, or seek to clarify how the
3 testimony was admissible" and did not "state that the evidence was
4 being offered for the state of mind of the defendant." (Opp'n at
5 85.) Therefore, the government states that "the review is for plain
6 error." (Id.) The government contends that "[n]o plain error
7 transpired" since the record "contains numerous examples of [Hayat]
8 pursuing the defense that he did not intend to go to a camp" and
9 "that [Hayat] was just lying to Mr. Khan about attending a camp."
10 (Id. at 85, 87.)

11 "A party must make known to the court at the time the
12 ruling or order is made or sought, . . . the action which he desires
13 the court to take or his objection to the action of the court and
14 the grounds therefor. . . . Absent plain error, a conviction will
15 not be reversed on evidentiary grounds not revealed to the trial
16 court at the time of the assertedly erroneous ruling." U.S. v.
17 Sims, 617 F.2d 1371, 1377 (9th Cir. 1980) (internal quotation marks
18 omitted). "If the significance of excluded evidence is not obvious,
19 an offer of proof must be made to preserve the question on appeal."
20 U.S. v. McCowan, 471 F.2d 361, 365 (10th Cir. 1972) (finding that it
21 was not error to exclude testimony when "there [was] nothing to show
22 that the inquiry in question was designed to elicit any competent
23 evidence in support of appellants' theory [and, to] the contrary, it
24 appear[ed] likely that hearsay was contemplated," yet no offer of
25 proof was made). Because Hayat did not make an offer of proof
26 regarding the seemingly inadmissible hearsay testimony he sought to
27 offer, Hayat must show that the ruling precluding him from inquiring
28 about the October 7 conversation constituted plain error.

1 "Plain error is only found in exceptional circumstances
2 where the reviewing court finds that reversal 'is necessary to
3 preserve the integrity and reputation of the judicial process, or to
4 prevent a miscarriage of justice.'" Sims, 617 F.2d at 1377.
5 Since other evidence in the record reveals Hayat's argument that he
6 did not intend to go to a training camp and that Hayat was simply
7 lying to Khan, the ruling was not plainly erroneous. See RT 1282-83
8 (Hayat's statements that he would not be able to shoot a gun); 1308
9 (Hayat's statement that going to a camp "can't be done these days");
10 1314 (Hayat's concerns about "the intense heat" at training camps);
11 1260 (Khan calling Hayat a liar); 1303 (Khan and Hayat's father
12 calling Hayat a liar); 1307 (Khan asking Hayat if he "ever told the
13 truth"); 4298-99 ("Naseem Khan could instigate these conversations
14 with [Hayat], and [Hayat] would literally talk it up. He would go
15 into details, and say all kinds of bizarre things. And the beauty
16 of it for Naseem Khan was that while Naseem knew that [Hayat] was
17 making it all up and lying and exaggerating, he didn't have to tell
18 the FBI that he thought that. . . . He knew that [Hayat] was a
19 storyteller."); 4302-03 ("[Hayat] brags. He tells stories. He lies
20 to Naseem Khan. And I think that Agent Terry Rankhorn, the
21 undercover agent who met [Hayat] on a number of occasions, when he
22 testified he put it best, out of his own mouth, when he said that
23 [Hayat]'s statements were more boasting than substance."); 4303
24 ("Naseem Khan himself often didn't believe [Hayat]"). Therefore,
25 Hayat is not entitled to a new trial on this ground.

26 **c. CIPA Order of March 1, 2006**

27 The ruling on this issue has been filed under seal.
28

1 **2. Exclusion of Portions of Defense Expert Weiss's**
2 **Testimony**

3 Hayat contends that "Professor Weiss, a highly qualified
4 Pakistani scholar, was prevented from offering proof of the
5 significance to Pakistanis of the Islamic supplication" that was
6 found in Hayat's wallet and "[t]hat testimony would have effectively
7 rebutted the highly inflammatory but factually baseless claim of
8 prosecution witness Mohammed, who had no expertise in the culture,
9 language, or politics of Pakistan, that carrying the prayer proved
10 [Hayat] possessed the mental state necessary to commit the charged
11 crimes." (Mot. at 5.) Hayat argues this "was constitutional error
12 that cannot be deemed harmless beyond a reasonable doubt." (Id. at
13 62.)

14 Specifically, Hayat is concerned with two limitations
15 imposed on Weiss's testimony: (1) barring Weiss from testifying as
16 to the sources on whom she relied in forming the opinion that the
17 verse was a taweez commonly carried by travelers (the testimony was
18 excluded as a sanction for what the court found to be Hayat's
19 willful failure to comply with Rule 16), and (2) sustaining an
20 objection to a question about whether the paper found in Hayat's
21 wallet was a taweez (the court sustained a foundation objection
22 because Weiss does not speak Arabic and the writing on the paper was
23 in Arabic). (See Reply at 26.)

24 **a. Sources**

25 Hayat argues "[i]t was . . . error to bar Weiss on
26 timeliness grounds from testifying as to the sources on which she
27 relied in forming her opinion, for the defense disclosures were no
28 less timely than those provided by the prosecution as to Mohammed's

1 sources." (Mot. at 56.) Hayat argues that the March 27
2 disclosures, which included the sources on whom Weiss relied in
3 forming the opinion that the verse was a taweez commonly carried by
4 travelers, were in fact timely, and therefore the testimony should
5 not have been excluded. (Id. at 58-59.)

6 The government responds that the Court properly excluded
7 the testimony at issue as a sanction for the defense's willful
8 failure to comply with Rule 16. (Opp'n at 90.) The government
9 argues that "[o]n February 20, 2006, approximately a week *after*
10 trial began, [Hayat] notified the Government that he intended to
11 call James Wedick and Anita Weiss as expert witnesses. Pursuant
12 to Rule 16, [Hayat] included Dr. Weiss' qualifications and proposed
13 testimony." (Id. at 91.) "On March 14, 2006, during its
14 case-in-chief, the Government introduced the Arabic supplication
15 found in [Hayat]'s wallet and called Dr. Mohammed to explain its
16 significance." (Id. at 92.) "On March 22 and 23, Government expert
17 Hassan Abbas testified. His testimony, among other things, related
18 to jihadi camps in Pakistan, including typical weapons training at
19 those camps." (Id.) "On March 27, 2006[, Hayat] provided new
20 disclosures about the testimony of Dr. Weiss. [T]hese disclosures
21 were not made until after Dr. Mohammed and Mr. Abbas had testified
22 [and] after the Government had filed various motions to preclude
23 [Wedick's] testimony . . . and the Court had ruled that his initial
24 disclosures were inadequate." (Id.) The government argues that
25 most of the opinions in the March 27 disclosures "were plainly not
26 disclosed in the earlier February 20 Weiss disclosure." (Id. at 93,
27 94.)

1 Upon the government's motion to exclude the testimony, the
2 court found that on March 27 Hayat "disclosed new testimony
3 which was not included in [his] previous disclosure"; that Hayat's
4 explanation was "disingenuous because [he had] known about the
5 information . . . yet [he] waited six weeks into the trial" to make
6 the disclosures; and Hayat's "failure to disclose the testimony was
7 'willful and motivated by a desire to obtain a tactical advantage'
8 because [he] waited to make [his] disclosures until after the
9 testimony of government witnesses Dr. Mohammed and Mr. Abbas and
10 until after the government challenged the testimony of [Hayat]'s
11 other proposed expert, James Wedick," and excluded the testimony.
12 (RT 3577, 3578.)

13 The Court "has wide discretion in its determination to
14 admit and exclude evidence, and this is particularly true in the
15 case of expert testimony." Hamling, 418 U.S. at 108. In excluding
16 evidence as a sanction for violating Rule 16, the Court only abuses
17 its discretion if the "evidence was of decisive value or if the
18 exclusion was disproportionate to the conduct of counsel." U.S. v.
19 Duran, 41 F.3d 540, 545 (9th Cir. 1994) (internal quotation marks
20 omitted). Exclusion is appropriate when "the omission was willful
21 and motivated by a desire to obtain a tactical advantage." Taylor
22 v. Ill., 484 U.S. 400, 415 (1988). While a criminal defendant has a
23 Sixth Amendment right to offer the testimony of witnesses, "[t]he
24 accused does not have an unfettered right to offer testimony that is
25 incompetent, privileged, or otherwise inadmissible under standard
26 rules of evidence." Taylor, 484 U.S. at 410.

27 Because evidence regarding the sources on whom Weiss
28 relied in forming the opinion that the verse was a taweez commonly

1 carried by travelers was not of decisive value, it was not an error
2 to exclude the testimony.

3 **b. Supplication as Taweez**

4 At trial, after Weiss testified regarding taweez in
5 general, defense counsel asked Weiss: "[B]ased on your understanding
6 of where that piece of paper was found, do you believe that it is a
7 ta'wiz?" (RT 4187.) The government objected on foundation grounds.
8 (Id.) The court sustained the objection: "The objection is
9 sustained [for] failure to establish the foundation that she speaks
10 the language that is written on the piece of paper, and that she
11 understands what is written on the piece of paper. And to the
12 extent that the piece of paper is folded in a manner that is
13 consistent with what she has already testified about, the evidence
14 is already in the record. So therefore it would be cumulative."
15 (RT 4191-92.)

16 Hayat contends "it was error to preclude Anita Weiss from
17 testifying about the supplication, as she was far more qualified to
18 opine as to the significance of the supplication to an Urdu speaking
19 Pakistani than was Mohammed." (Mot. at 56.) Hayat argues that
20 "Weiss was indisputably qualified to answer the crucial question to
21 which the Court sustained an objection - whether the supplication
22 was a taweez. That question called for knowledge about Pakistani
23 cultural and religious practices, as to which Weiss is one of the
24 country's leading experts. Whether Weiss spoke Arabic was
25 irrelevant to the question posed to her, because Pakistanis
26 generally do not speak Arabic; they speak Urdu, in which Weiss is
27 fluent." (Id. at 60.) Hayat further argues that the exclusion of
28 Weiss's testimony regarding the supplication was prejudicial since,

1 without it, Mohammed's testimony was essentially left unrebutted.
2 (Id.)

3 The government argues the court's exclusion of the
4 testimony was proper since Weiss did not speak or read Arabic and
5 was therefore "unqualified to form an opinion about the correct
6 translation of th[e] Arabic supplication much less an opinion as to
7 how 'common' th[e] Arabic supplication was or is in Pakistan."
8 (Opp'n at 103.) The government further argues that the excluded
9 evidence was not "of decisive value" since Hayat "still had the
10 ability, pursuant to [the] February 20 disclosure, to seek to
11 introduce [Weiss's] other opinions related to the cultural practice
12 of carrying a taweez and, in fact, actually introduced some evidence
13 related thereto at trial." (Id. at 102.)

14 It was not error to sustain the foundation objection
15 because, as the government noted, the piece of paper in Hayat's
16 wallet could have been something other than a taweez (such as an
17 address (RT 4188)), and without knowing Arabic, Weiss could not know
18 whether the piece of paper constituted a taweez. Furthermore, Weiss
19 had already testified about the practice of carrying a taweez on the
20 body somewhere (RT 4178-80), (and could have further testified about
21 the practice of carrying a taweez) so the jury could have inferred
22 that the paper in Hayat's wallet was a taweez. Moreover, in closing
23 argument, defense counsel called into question Mohammed's
24 qualifications to testify regarding the supplication and reminded
25 the jury that Weiss had testified about what a taweez is and when a
26 taweez is typically carried, such that the jury could have inferred
27
28

1 that the piece of paper in Hayat's wallet was a taweez.¹¹
2 Therefore, Hayat is not entitled to a new trial on this ground.

3 **3. Exclusion of Defense Expert Wedick**

4 Hayat argues "the exclusion of Wedick's expert testimony
5 violated [his] constitutional right . . . to challenge the
6 credibility of his purported admissions of guilt to the FBI," and
7 "that error cannot be deemed harmless beyond a reasonable doubt."
8 (Mot. at 5-6, 69.) Hayat states in his expert disclosures, in

9
10 ¹¹ Portions of Hayat's counsel's closing argument are stated
11 below:

12 Dr. Mohammed admitted on the stand that his views were
13 controversial amongst Muslim scholars. He admitted on
14 the stand that he dismissed the accuracy of
15 translations of that exact prayer that were translated
16 by published Muslim scholars. He also admitted that he,
17 himself, has not published regarding that prayer. Dr.
18 Mohammed has never been to Pakistan and he doesn't
19 understand the culture.

20 (RT 4322);

21 See, the problem with Dr. Mohammed's testimony about
22 that prayer is that he has no idea of the cultural
23 context of carrying such a prayer in Pakistan. He can't
24 possibly because he just doesn't know about Pakistani
25 culture. Dr. Anita Weiss, however, is an expert on
26 Pakistani culture. You heard her tell you that carrying
27 prayers in Arabic is a very common practice in
28 Pakistan, especially by travelers for safety reasons.
The government either doesn't understand the cultural
significance of carrying a ta'wiz or it didn't want you
to know about it. Because had they asked their other
expert, Mr. Abbas, who knows about Pakistani culture,
he would have told them that Dr. Mohammed's conclusions
were wrong, and that prayers like those are commonly
carried by travelers and not warriors. So Dr.
Mohammed's testimony itself was problematic. And the
existence of that prayer in [Hayat]'s wallet doesn't
prove that he went to a terrorist training camp.

(RT 4323-24.)

1 relevant part, that Wedick was to testify as follows:

2 Mr. Wedick will testify that the interviewing
3 agents did not consider but should have
4 considered Hamid's vulnerabilities as an
5 interviewee. Specifically, Mr. Wedick will opine
6 that the agents should have considered Hamid's
7 age, intelligen[ce] quotient, level of
8 education, mental handicap, language barrier,
9 health, marriage and/or family status,
10 occupation and employment status, religion
11 and/or belief in God, illiteracy, fatigue,
12 social isolation, and experience with the
13 criminal justice system. Mr. Wedick will explain
14 that all of these factors should be considered
15 by FBI agents in conducting interviews to insure
16 the validity of any elicited "confessions."

17 Mr. Wedick will testify that the FBI agents
18 should have frequently reminded Hamid Hayat that
19 the interview was noncustodial in nature and
20 that he was free to go . . .

21 Mr. Wedick will testify that Agent Schaff, Agent
22 Sweeney, Agent Harrison, Agent Aguilar and Agent
23 Lucero all used leading questions during the
24 interviews of Hamid Hayat. Specifically, they
25 suggested the names of locations of terrorist
26 training camps in Pakistan; the dates when Hamid
27 Hayat allegedly attended; the time frame that
28 Hamid allegedly attended; the leadership of the
camps that Hamid allegedly attended; the type of
training camp that Hamid Hayat allegedly
attended; the physical properties of the camp
that Hamid allegedly attended; the names of
other individuals in Lodi that allegedly
attended, and the types of potential targets of
terrorist attacks. Mr. Wedick will testify that
the agents did not ask sufficient open-ended
questions. Mr. Wedick will opine that the
agents' use of leading questions throughout the
interview contaminated the "confessions" to
render them unreliable. Mr. Wedick bases his
opinion on his training and experience which
dictates that agents should avoid asking too
many leading questions because there is a danger
of eliciting a contaminated confession in doing
so.

(Mot. at 62-63.)¹²

¹² According to Hayat's motion, his expert disclosures also
stated that Mr. Wedick would testify "that the FBI Sacramento office
had the capability to videotape Hamid Hayat's interview right when

1 Hayat argues "[t]hat a confession taken under [Hayat's]
2 circumstances may well be false or unreliable is knowledge that is
3 not generally within the experience of jurors" and that "[b]ased on
4 [Mr. Wedick's] extensive experience with FBI interrogations, Mr.
5 Wedick was ideally qualified to testify to the fact that the
6 techniques used by the interrogating agents exponentially increased,
7 rather than minimized, the risk of a false confession." (Id. at
8 67.) Hayat argues that, although "the defense explored the
9 techniques used by the interrogators with the agents themselves when
10 they took the stand[,] Wedick's testimony would not have been in any
11 way cumulative, for the agents uniformly defended the propriety of
12 the methods they used to question [and] Wedick's testimony [was
13 going to be] that the relentlessly suggestive nature of the
14 interrogation, when combined with the promise of benefits and
15 [Hayat]'s limited education and physical condition, posed a grave
16 danger of contamination." (Id. at 67-68.)

17 Hayat relies primarily upon Crane and Alcala for his
18 position. (Id. at 64-65.) Crane involved a sixteen year old
19 defendant who contended he confessed after having been "detained in
20 a windowless room for a protracted period of time, surrounded by as
21 many as six police officers during the interrogation, repeatedly
22 . . . denied permission to telephone his mother, and badgered into
23 making a false confession." 476 U.S. at 685. Crane was precluded

24
25 it actually started including the ability to use a handheld video
26 camera" and "that it was inappropriate to begin videotaping his
27 interview only after a 'confession' had been elicited after hours of
28 interviewing." (Mot. at 62.) However, Hayat's motion for a new
trial focuses on the court's exclusion of Wedick's testimony
regarding the unreliability of Hayat's confession, and does not
address this issue. (Id. at 66-69, Reply at 28-30.)

1 from "introduc[ing] testimony about the environment in which the
2 police secured his confession," which the Supreme Court held
3 violated his constitutional right to present a complete defense.
4 476 U.S. at 691. In Alcala, the Ninth Circuit found that excluding
5 a psychologist's testimony that a chief prosecution witness had been
6 hypnotized by investigators and that the hypnotic and suggestive
7 interview techniques impacted the government witness's ability to
8 remember the incident and led her to adopt the investigators'
9 suggestions, violated the defendant's constitutional rights because
10 the psychologist's testimony was the sole basis for impeaching the
11 witness's testimony. 334 F.3d at 877-78.

12 The government counters that the Court properly excluded
13 Wedick's proffered expert testimony under Federal Rule of Criminal
14 Procedure 16, Federal Rule of Evidence 702, and Federal Rule of
15 Evidence 403. (Opp'n at 3.) The government argues Wedick's
16 proposed testimony regarding whether the interrogators should have
17 advised Hayat that he was free to leave the interview was properly
18 excluded because Hayat "had already extensively [presented] the
19 facts related to th[is] issue[] with numerous FBI agents" and
20 "'expert' evidence on th[is] point[] would have been needlessly
21 confusing, cumulative and wasteful of time." (Id. at 116.) The
22 government further contends that this evidence was inadmissible
23 because Hayat "failed to provide the Government with a timely and
24 adequate summary of these opinions, the bases and reasons for the
25 opinions, and the witness's qualifications related thereto"; Hayat
26 "made no showing whatsoever regarding what specialized knowledge, if
27 any, Mr. Wedick had regarding the area of his proposed opinions,
28 other than to state, in a conclusory fashion, that Wedick had

1 experience and training with interviews"; Hayat "failed to establish
2 that the proffered opinions were reliable"; and "the record had
3 already been developed on the question of whether [Hayat] was
4 advised about his rights and/or freedom to leave the FBI [and the
5 issue] could readily be (and was) argued by counsel during closing
6 and understood and evaluated by the jury." (Id. at 117-19.)

7 The government also contends that the Court properly
8 excluded Wedick's testimony regarding whether the agents failed to
9 consider Hayat's background in order to insure the validity of any
10 elicited confessions and whether the agents' use of leading
11 questions contaminated Hayat's confessions. (Id. at 119.) The
12 government argues Hayat "failed to establish how the proffered
13 opinions would assist the trier of fact [since the jury] was fully
14 capable of listening to the evidence adduced regarding the
15 circumstances of the confession, and to the arguments of counsel
16 regarding the reliability of the confessions, and render a
17 credibility judgment regarding the confession on its own." (Id. at
18 119, 120.) The government further contends that Hayat "failed to
19 provide the Government with a timely and adequate summary of these
20 opinions, the bases and reasons for the opinions, and the witness's
21 qualifications related thereto"; Hayat made "no adequate showing
22 that Mr. Wedick had appropriate qualifications . . . to opine on the
23 issue of false confessions [since] the opinion that an individual's
24 statement constitutes a 'false admission' . . . necessarily involves
25 an evaluation of the psychological characteristics of the individual
26 in question"; Hayat "failed to demonstrate that Mr. Wedick's
27 proposed testimony would be in any way reliable"; Hayat "failed to
28 establish how the proffered opinion[s] would be relevant"; and "any

1 marginal probative value associated with these proffered opinions
2 would have been substantially outweighed by the risk of unfair
3 prejudice, confusion of issues, or undue consumption of time
4 associated therewith." (Id. at 119-24.) Finally, the government
5 argues that Hayat is now trying "to recast many of the opinions
6 purportedly offered by Mr. Wedick" and that those "summary
7 statements by defense counsel were not disclosed at the time of
8 trial as being proposed opinions to be offered by Mr. Wedick, nor
9 are these statements a fair summation of what was disclosed." (Id.
10 at 124, 125.)

11 Federal Rule of Evidence 702 provides that "scientific,
12 technical, or other specialized knowledge [is admissible if it] will
13 assist the trier of fact to understand the evidence or to determine
14 a fact in issue." See also U.S. v. Rahm, 993 F.2d 1405, 1413 (9th
15 Cir. 1993) (expert testimony not admissible on "matters within the
16 understanding of the average juror"); U.S. v. Morales, 108 F.3d
17 1031, 1038 (9th Cir. 1997) (expert testimony not admissible unless
18 "the subject matter at issue is beyond the common knowledge of the
19 average layman"). "[Rule] 702 imposes a 'gatekeeping' obligation on
20 the trial judge to 'ensure that any and all [expert] testimony . . .
21 is not only relevant, but reliable.'" U.S. v. Hankey, 203 F.3d at
22 1167 (quoting Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579
23 (1993) and citing Kumho Tire Co. v. Carmichael, 526 U.S. 137
24 (1999)). "[J]udges are entitled to broad discretion when
25 discharging their gatekeeping function." Hankey, 203 F.3d at 1168
26 (citing Kumho Tire Co.).

27 Further, Federal Rule of Evidence 403 provides that
28 "[a]lthough relevant, evidence may be excluded if its probative

1 value is substantially outweighed by the danger of unfair prejudice,
2 confusion of the issues, or misleading the jury, or by
3 considerations of undue delay, waste of time, or needless
4 presentation of cumulative evidence."

5 Wedick's proposed expert testimony that "the FBI special
6 agents should have reminded [Hayat] that [his] interviews were non-
7 custodial and that [he was] free to go" was excluded because the
8 matter had "already [been] extensively explored," and the testimony
9 "ha[d] only marginal probative value, which [was] outweighed by
10 [Rule 403 considerations]." (RT 3519, 3521.) This exclusion was
11 not erroneous.¹³ (See RT 771-73, 3719, 4319-20.)

12 Wedick's proposed expert testimony that the FBI agents
13 should have considered Hayat's "vulnerabilities as an interviewee"
14 in order "to insure the validity of any elicited 'confessions'" and
15 that the agents' use of "leading questions during [Hayat's]
16 interviews . . . contaminated the 'confessions' to render them
17 unreliable" was also properly excluded at trial. (See RT 3521-22.)

18 This case is different from Crane and Alcala, the cases
19 upon which Hayat primarily relies, because the circumstances of
20 Hayat's interrogation and confessions were readily apparent to the
21 jury through the testimony of the interviewing FBI agents and the
22 videotapes, and therefore, Wedick's testimony was not necessary to
23 inform the jury about the circumstances surrounding Hayat's
24

25 ¹³ Hayat does not contend that the FBI agents were *obligated*
26 to inform Hayat that he was free to leave the interview; rather,
27 Hayat contends that Wedick was entitled to testify that they "should
28 have" done so. (Mot. at 63.) Hayat argues that the FBI agents'
failure to do so contributed to the "circumstances" that made the
confession unreliable; however, Hayat's disclosures did not state
that Wedick would testify as such. (Id. at 66-67, 63.)

1 confessions.¹⁴ See Ritt v. Dingle, 142 F. Supp. 2d 1142, 1145 (D.
2 Minn. 2001) ("Petitioner was allowed to present the jury a videotape
3 of her interrogation . . . which showed the circumstances of her
4 confession. Petitioner's reliance on Crane for the admissibility of
5 the proffered expert testimony is misplaced as Crane does not
6 discuss expert testimony in a similar factual context. Given the
7 more direct evidence of the videotape, the trial court decision to
8 exclude expert testimony on the interrogation technique was
9 reasonable.") (internal citations omitted); State of Minn. v. Ritt,
10 599 N.W.2d 802, 812 (Minn. 1999), reviewed by Ritt v. Dingle, 142 F.
11 Supp. 2d 1142 (Defendant's "interview and formal statement were
12 videotaped and the jury could observe the surrounding environment
13 and circumstances").

14 Nor was it erroneous to preclude Wedick from explaining to
15 the jury that failing to consider Hayat's vulnerabilities and using
16 leading questions may lead to unreliable confessions. Bixler v.
17 Minn., 582 N.W.2d 252, 256 (Minn. 1998) (upholding the trial court's
18 "ruling that the jury, without [expert testimony], was fully capable
19 of observing and understanding [the defendant's] propensity to
20 please authority figures, and taking those observations and that
21 understanding into account in evaluating his confession."). The
22 government argues that Hayat did not establish Wedick's

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24 ¹⁴ The initial interview of Hayat at FBI headquarters by
25 Agent Aguilar and the subsequent interview by Agent Sweeney (in
26 which Hayat's first confession was obtained) were not videotaped.
(RT 699, 529.) The remaining interviews of Hayat were videotaped.
(Gov't Exs. 19-22.)

27 The jury saw part of the videotapes during the
28 government's case-in-chief, and all of the videotapes during Hayat's
case. Moreover, during deliberations the jury had the videotapes
played again, which suggests that the jury thoroughly analyzed the
interrogation and confessions.

1 qualification to testify regarding these issues since "the opinion
2 that an individual's statement constitutes a 'false admission' . . .
3 necessarily involves an evaluation of the psychological
4 characteristics of the individual in question" and Wedick "has no
5 training or experience in any field that would permit him to opine
6 on the psychological condition of [Hayat], or to opine that any
7 particular act or omission by the agents led [Hayat] to admit his
8 guilt falsely." (Opp'n at 122-23.) Hayat argues Wedick should have
9 been permitted to testify, based on his extensive experience with
10 FBI interrogations, that the use of leading questions and the
11 failure to consider Hayat's vulnerabilities (specifically, age,
12 intelligence quotient, level of education, mental handicap, language
13 barrier, health, marriage and/or family status, occupation and
14 employment status, religion and/or belief in God, illiteracy,
15 fatigue, social isolation, and experience with the criminal justice
16 system) increased the risk of Hayat's confession being unreliable.
17 (Mot. at 63, 67.)

18 Hayat cites to U.S. v. Hall, 93 F.3d 1337 (7th Cir. 1996),
19 in support of his indication that Wedick should have been permitted
20 to testify that Hayat's "'confession' to the crime was false."
21 (Mot. at 65.) The Court in Hall held that it was error to exclude
22 expert psychological and psychiatric testimony that the defendant
23 had a personality disorder that made him pathologically eager to
24 please and susceptible to suggestion, calling into question the
25 reliability of the defendant's confession. Hayat argues that Hall
26 "explained that since the fields of psychology and psychiatry deal
27 with human behavior and mental disorders it may be more difficult at
28 times to distinguish between testimony which reflects 'genuine

1 expertise' and 'something that is nothing more than fancy phrases
2 for common sense.'" (Id. at 65-66 (quoting Hall, 93 F.3d at 1342).)

3 But, Hayat has not shown Wedick is qualified as an expert
4 in the field of psychology or psychiatry, or otherwise had the
5 qualification to give expert testimony regarding Hayat's alleged
6 susceptibility to suggestion and coercion. Specifically, Hayat has
7 not shown Wedick's qualification to testify about Hayat's
8 intelligence quotient, alleged mental handicap, or social isolation.
9 Nor does the record indicate that Wedick was in a better position
10 than a juror to opine about Hayat's age, language barrier, marriage
11 and/or family status, or any fatigue factor; and Wedick's testimony
12 was unnecessary to inform the jury about Hayat's level of education,
13 health, occupation and employment status, religion and/or belief in
14 God, illiteracy, or experience with the criminal justice system.
15 See U.S. v. Adams, 271 F.3d 1236, 1244 (10th Cir. 2001) (upholding
16 the district court's exclusion of a psychologist's report with which
17 the defendant wished to challenge the credibility of his prior
18 statements to police; finding that nothing in Crane warranted the
19 categorical admission of evidence; and noting that expert evidence
20 relating to the credibility of a confession was problematic for a
21 variety of reasons: it may invade the province of the jury, and,
22 thus, not "assist" the jury as required by Rule 702; it may exceed
23 the scope of the witness's expertise; or be overly prejudicial under
24 Rule 403, as witnesses may tend to overvalue scientific evidence as
25 it bears on truthfulness); U.S. v. Charley, 189 F.3d 1251, 1267
26 (10th Cir. 1999) ("[E]xpert testimony which does nothing but vouch
27 for the credibility of another witness encroaches upon the jury's
28 vital and exclusive function to make credibility determinations, and

1 therefore does not 'assist the trier of fact' as required by Rule
2 702."); U.S. v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973)
3 ("Credibility . . . is for the jury - the jury is the lie detector
4 in the courtroom.").

5 It was also not erroneous to exclude Wedick's testimony as
6 to whether the failure to consider a defendant's vulnerabilities and
7 the use of leading questions generally could lead to an unreliable
8 confession. Such an exclusion was proper under Federal Rules of
9 Evidence 702 and 403 since the testimony would have had little
10 probative value and would not have assisted the jury as contemplated
11 by Rule 702.¹⁵ Ritt, 142 F. Supp. 2d at 1145 (finding that
12 testimony regarding the interrogation techniques used in eliciting
13 the defendant's confession was unnecessary since the jury was able
14 to view a videotape of the confession); Scott v. Tex., 165 S.W.3d
15 27, 55-57 (Tex. App. 2005) (finding that the exclusion of expert
16 testimony from a social psychologist and criminologist regarding
17 police interrogation techniques and false confessions was not
18 erroneous because it was within the trial court's discretion to
19 determine that the testimony was unreliable and would not assist a
20

21 ¹⁵ Hayat relies upon Smith v. U.S., 348 U.S. 147 (1954), in
22 arguing that whether a confession taken under Hayat's circumstances
23 is false or unreliable is knowledge that is not generally within the
24 experience of jurors. In Smith, the court said that the reliability
25 of a confession "may be suspect if it is extracted from one who is
26 under the pressure of a police investigation-whose words may reflect
27 the strain and confusion attending his predicament rather than a
28 clear reflection of his past" and that "this experience with
confessions is not shared by the average juror." Id. at 153-54.
However, not only is Smith factually distinguishable, but in Hayat's
case, the jury was able to view and hear testimony about the
confessions, and defense counsel explained to the jury during
closing argument that Hayat's confession was unreliable because of
the manner in which it was elicited.

1 trier of fact). The jury was able to hear testimony from the
2 interviewing FBI agents regarding the circumstances of Hayat's
3 confessions and was able to see Hayat's videotaped confessions, and
4 any connection that Hayat wanted Wedick to make between the factual
5 circumstances of Hayat's confessions and factors that lead to
6 unreliable confession could have been and was ultimately made by
7 defense counsel during closing arguments.¹⁶ See U.S. v.

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9 ¹⁶ Portions of Hayat's counsel's closing argument are stated
10 below:

11 You watched the videotape of Hamid Hayat on that screen. You
12 watched his interview. And you got that feeling inside of
13 you that something wasn't right when those agents
14 manipulated him into answering leading questions, and
15 getting him to say what they wanted him to say.

16 (RT 4286);

17 First thing Agent Aguilar did [when Hayat arrived at the FBI
18 office] was show him pictures of his wedding Agent
19 Aguilar knew what these pictures were, and yet he showed
20 them to [Hayat] as an intimidation factor. First he
21 intimidated [Hayat] into coming to the FBI office, out of
22 the comfort zone of his own home. Then he immediately showed
23 him these pictures.

24 (RT 4311-12);

25 Then the intimidation continues on that day. When Hamid Hayat
26 is interviewed by Agent Harry Sweeney in an unrecorded
27 interview, Agent Sweeney asks [Hayat] if he received weapons
28 training at a camp, and [Hayat] adamantly denies it. Agent
Sweeney asks [Hayat] if he received training to fight against
the United States, and [Hayat] adamantly denies it At
some point Agent Sweeney tells [Hayat] that the government
has a satellite image of [Hayat] at a camp in Pakistan. While
Agent Sweeney was on the stand, I asked him, I said, was this
the question that was asked before Hamid Hayat said he went
to a camp, and he said yes. And he admitted that this was a
tactic, and he admitted that no such image exists. So [Hayat]
is at the FBI office, outside of the comfort of his own home,
he's shown pictures of his own wedding celebration and
accused that those pictures reflect some sort of a camp. Then

1 Fuentes-Cariaga, 209 F.3d 1140, 1142, n.3 (9th Cir. 2000) (expert
2 testimony not admissible if the testimony is "about an issue within
3 the ken of the jury's knowledge"); In re Air Crash Disaster at New
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5 he's told by Agent Sweeney that there is an image of him at a
6 camp. After -- at some point we know that [Hayat] said that
7 he attended a camp when he spoke with Agent Sweeney. And this
8 is not because there is a recorded interview, this is because
9 this is what Agent Sweeney told us. So we don't really know
10 the details of the types of questioning that was asked during
11 that interview. What we do know is that the interview lasted
12 for a few hours, and it's likely that the intimidation
13 tactics continued during this unrecorded interview.

14 (RT 4313-14);

15 Agent Schaaf admitted on the stand that he asked many
16 leading questions of [Hayat]. He also said that open-ended
17 questions are the preferred practice in conducting
18 interviews in the FBI. He knew that the quality of his
19 interview would be jeopardized by asking leading questions,
20 but he went ahead and did it anyway. How else was he going
21 to get Hamid Hayat to say what he wanted him to say?

22 (RT 4314);

23 While he was on the stand, Agent Schaaf admitted that he
24 first mentioned the word jihad during that interview; that
25 the idea of traveling to the camp by bus, he made that
26 mention first; that he first suggested that it took between
27 three and ten hours to arrive at the camp; that he first
28 suggested the idea of arriving at the camp in the dark; and
that he first suggested the idea of killing Americans at the
camp. He also first suggested that there was extensive
weapons training, there was explosives and rifles training,
and he first mentioned the names of extremist groups in
Pakistan. The government is going to tell you that these
questions were based on a prior interview that [Hayat] had
with Agent Sweeney. But, remember, we have no recording of
that interview. We don't know how many leading questions
were asked in that interview. That interview was not
recorded for a reason. It's likely that the government knew
exactly what it wanted [Hayat] to say, and they intimidated
him by asking him leading questions and using other
intimidation tactics.

(RT 4314-15);

1 Orleans, 795 F.2d 1230, 1233 (5th Cir. 1986) (Expert testimony must
2 "bring to the jury more than the lawyers can offer in argument,
3 otherwise the expert testimony does not assist the trier of fact to
4 understand the evidence or to determine a fact in issue."); Maine v.
5 MacDonald, 718 A.2d 195, 198 (Me. 1998) ("[T]he court reasonably
6 could have concluded that [the expert's] testimony would do little
7 more than reinforce a concept already well within the jurors'
8 grasps, namely, that people sometimes lie to protect those close to
9 them.").

11 When you watch the video of Hamid Hayat, you saw [Hayat]
12 was visibly tired. You heard [Hayat] complain of being
13 tired, sleepy, and having a headache during the
14 interview. He actually told the agents this. You heard
15 him say at one point his mind wasn't working. You heard
16 him answer questions with, I'll say, or, I'll say that,
17 over 60 times during that interview.

18 (RT 4317-18);

19 Agent Schaaf, in fact testified that there were portions
20 of [Hayat]'s interview that he did not believe. So, how
21 did Agent Schaaf decide what he wanted to believe? Of
22 course he knew what he wanted [Hayat] to say, and he
23 chose to believe what he wanted to believe. Because,
24 remember, he asked him leading questions, and when he
25 couldn't lead him to the answer of the question the way
26 that he wanted it, he chose not to believe it.

27 (RT 4318);

28 [A]ll of the information that was elicited from [Agent
Schaaf's] leading questions led to a meaningless
confession. . . . You have Hamid Hayat being intimidated
into saying things that the FBI wanted him to say. He was
never told that he could leave. You didn't hear an agent
say that to him. In fact, you heard him ask the agents if
he could go home or if he could see his father. The
agents ignored his request. You heard him make these
requests before he was even arrested when he was free to
leave. But the agents ignored his request. As you watch
the video, you saw [Hayat] make every effort to
cooperate. And when he was being arrested, he didn't even

1 Moreover, even if the exclusion of Wedick's testimony was
2 improper, it was harmless because the jury ultimately heard, through
3 other testimony and closing arguments, all of the testimony that
4 Wedick would have offered. Therefore, Hayat is not entitled to a
5 new trial based on the exclusion of Wedick's testimony.

6 **D. New Evidence**

7 Hayat contends he is entitled to a new trial under Rule 33
8 based on "newly discovered" evidence. (Mot. at 7.) Hayat contends
9 the testimony of Usama and Jaber Ismail, two eyewitnesses who were
10 in Pakistan with Hayat and who observed his conduct for most or all
11 of the period between October 2003 and November 2004 when he
12 allegedly attended a terrorist training camp, justifies a new trial.
13 (Id.)

14 Hayat argues that "[i]n this case, in which the government
15 produced no evidence that Hayat attended a training camp apart from
16 [Hayat]'s often incoherent, contradictory, and even bizarre
17 statements, the testimony of Usama and Jaber, if credited, would

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19 know what was happening to him. He didn't realize that by
20 telling the FBI what they wanted to hear, that he
21 attended a camp in Pakistan, that he had just gotten
22 himself into a whole lot of trouble. It's really quite
23 sad to watch that video and watch [Hayat] say things that
24 make no sense. They don't even make sense to the agents
25 who are listening to them. And you really see him trying
26 to cooperate and provide the answers the best that he
27 can.

28 (RT 4318-19);

 The entire interview was meaningless, and it does not
prove that [Hayat] went to a camp. . . . And because
[Hayat]'s statements come from a meaningless confession,
and they are completely unreliable, the government,
ladies and gentlemen, is left with nothing.

(RT 4320).

1 result in Hayat's acquittal." (Id. at 105.) Hayat contends that
2 "[t]heir testimony is affirmative proof of innocence, and in no
3 sense is cumulative or merely impeaching." (Id.)

4 Hayat argues that Jaber could not be produced at trial
5 because he "was in Pakistan on a no-fly list," and that Usama could
6 not be called to testify "because his court-appointed lawyer had
7 invoked his Fifth Amendment right [not] to testify." (Id. at 101,
8 102.) Hayat contends that although Usama provided the testimony
9 that is in his affidavit in an FBI interview that "was memorialized
10 in a 302 provided to the defense prior to trial[,] Hayat was no more
11 able to produce Usama at trial than he would have been had his
12 counsel been unaware of Usama's existence or the exculpatory
13 evidence he could provide." (Id. at 105.)

14 The government responds that "the proffered testimony of
15 Usama Ismail and Jaber Ismail does not constitute 'newly discovered
16 evidence' justifying a new trial [since Hayat] was aware of their
17 potential testimony prior to trial, [Hayat] failed to diligently
18 seek to secure such testimony, and, the testimony would not likely
19 have resulted in an acquittal of [Hayat]." (Opp'n at 4; 181-87.)
20 The government argues that Usama ultimately did not testify at trial
21 because Hayat's counsel "decided not to serve Usama with a subpoena
22 because [she] thought [her] efforts would be futile." (Id. at 182
23 (quoting Mojaddidi Aff. ¶¶ 5-6).) Further, the government contends
24 that "[d]efense counsel offers no explanation whatsoever as to
25 whether the defense made any effort to contact Jaber Ismail to
26 interview him or attempt to secure his presence or testimony for
27 trial" and that Jaber did not discover that he was on the no-fly
28

1 list until after the case was submitted to the jury. (Opp'n at
2 183.)

3 The government also argues that even if the proposed
4 testimony is considered newly discovered, Hayat cannot show no lack
5 of diligence since Hayat did not try to secure the Ismails' presence
6 at trial, did not explore any alternative means of obtaining their
7 testimony, and never informed the court that he was having
8 difficulty securing their testimony. (Id. at 185-86.)
9 Additionally, the government contends that given the other evidence
10 presented in this case, "the proposed testimony does not indicate
11 that a new trial would likely result in acquittal." (Id. at 186.)

12 To prevail on a Rule 33 motion for a new trial on the
13 grounds of newly discovered evidence, "the movant must satisfy a
14 five-part test: (1) the evidence must be newly discovered; (2) the
15 failure to discover the evidence sooner must not be the result of a
16 lack of diligence on [Hayat]'s part; (3) the evidence must be
17 material to the issues at trial; (4) the evidence must be neither
18 cumulative nor merely impeaching; and (5) the evidence must indicate
19 that a new trial would probably result in acquittal." U.S. v.
20 Kulczyk, 931 F.2d 542, 548 (9th Cir. 1991).

21 "[N]ewly discovered" means, "in fact, newly discovered,
22 i.e., after trial." U.S. v. McKinney, 952 F.2d 333, 335 (9th Cir.
23 1991). "Evidence known or discovered before the trial is over is
24 not newly discovered." Id. at 336. "[W]hen a defendant who has
25 chosen not to testify comes forward to offer testimony exculpating a
26 codefendant, the evidence is not 'newly discovered.'" U.S. v.
27 Lockett, 919 F.2d 585, 591 (9th Cir. 1990); see also U.S. v.
28 DiBernardo, 880 F.2d 1216, 1224-25 (11th Cir. 1989) (where

1 defendants were "well aware" of witness' proposed testimony prior to
2 trial, "the testimony cannot be deemed 'newly discovered evidence'
3 within the meaning of Rule 33"); U.S. v. Jacobs, 475 F.2d 270, 286
4 n.33 (2d Cir.) ("[A] court must exercise great caution in
5 considering evidence to be 'newly discovered' when it existed all
6 along and was unavailable only because a co-defendant, since
7 convicted, had availed himself of his privilege not to testify").
8 Since the testimony of the Ismails was known to Hayat prior to
9 trial, it cannot be deemed "newly discovered." Therefore, Hayat is
10 not entitled to a new trial based on the Ismails' testimony.

11 **E. Cumulative Effect of All Alleged Errors**

12 Hayat argues that "[i]f, after considering all of Hayat's
13 claims both singly and in combination, the Court believes that 'a
14 serious miscarriage of justice may have occurred, it may set aside
15 the verdict, and submit the issues for determination by another
16 jury.'" (Reply at 3 (quoting Kellington, 217 F.3d at 1097).)
17 Additionally, the cumulative effect of errors made at trial may
18 deprive a defendant of a fair trial and require a new trial. U.S.
19 v. Tory, 52 F.3d 207, 211 (9th Cir. 1995).

20 Hayat's motion for a new trial is also denied under this
21 standard.

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Dated: May 17, 2007


GARLAND E. BURRELL, JR.
United States District Judge